11-2332

(& 11-2714)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY
d/b/a AT&T CONNECTICUT,
Plaintiff-Appellant-Cross-Appellee,

v.

CABLEVISION LIGHTPATH-CONNECTICUT, INC., COX CONNECTICUT TELCOM, LLC, AND COMCAST PHONE OF CONNECTICUT, INC.,

Intervenor-Defendants-Appellees-Cross-Appellants,

METROPCS NEW YORK, LLC, SPRINT COMMUNICATIONS, L.P., SPRINT SPECTRUM, L.P., NEXTEL COMMUNICATIONS OF THE MID-ATLANTIC, INC., AND YOUGHIOGHENY COMMUNICATIONS-NORTHEAST, LLC,
Intervenor-Defendants-Appellees, and

ANTHONY J. PALERMINO, COMMISSIONER, CONNECTICUT DEPARTMENT OF PUBLIC UTILITY CONTROL; KEVIN M. DELGOBBO, COMMISSIONER, CONNECTICUT DEPARTMENT OF PUBLIC UTILITY CONTROL; AND JOHN W. BETOSKI, III, COMMISSIONER, CONNECTICUT DEPARTMENT OF PUBLIC UTILITY CONTROL,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT
CASE NO. 3:09-CV-1787(WWE)
HON. WARREN W. EGINTON

OPENING BRIEF FOR PLAINTIFF-APPELLANT-CROSS-APPELLEE
THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, appellant and cross-appellee The Southern New England Telephone Company d/b/a AT&T Connecticut hereby states that it is a wholly-owned subsidiary of AT&T Teleholdings, Inc., which in turn is a wholly-owned subsidiary of AT&T Inc., a publicly held company.

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JURISDICTIONAL STATEMENT

This case came to the district court when The Southern New England Telephone Company d/b/a AT&T Connecticut ("AT&T Connecticut") filed a Complaint alleging that a Decision by the Connecticut Department of Public Utility Control ("DPUC" or "Department")[1] violated federal and state law. The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337, and 1367. The district court entered final judgment on May 11, 2011, and this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. The 1996 Act designates the Federal Communications Commission ("FCC") as the entity to establish rules and requirements implementing Section 251 of the Act. 47 U.S.C. § 251(d). The FCC has never required transit service to be treated as interconnection under Section 251. To the contrary, whenever the issue has arisen, the FCC has declined to treat transit service as interconnection or require artificially low regulated pricing of that service. The question here is whether, in light of this law, the Connecticut's DPUC's generic declaration that transit service must be treated as interconnection under Section 251(c)(2), and subject to artificially low regulated pricing, is preempted.

[1] As of July 1, 2011, the DPUC was renamed the Public Utility Regulatory Authority and aligned under the new state Department of Energy and Environmental Protection. For simplicity and consistency, AT&T Connecticut will in this brief continue to refer to the agency as the DPUC or Department.

2. Even if the DPUC's Decision were not preempted, the next question is whether it was correct in finding that transit service fits within the federal definition of interconnection, including the requirement that interconnection be for the "mutual exchange" of traffic, even though a transit service provider does not use that service to exchange its end-user customers' traffic with any other carrier.

3. Even if transit service could be treated as interconnection under Section 251 of the 1996 Act, a separate question is whether it properly falls under Section 251(a)(1) or Section 251(c)(2), a distinction that has important pricing consequences.

4. Separate from the issues above is the question whether the DPUC's declaratory ruling here exceeded the scope of authority delegated to it under state law and violated the DPUC's own rules.

STATEMENT OF THE CASE

On December 2, 2008 a telecommunications carrier known as Youghiogheny Communications-Northeast, LLC d/b/a Pocket Communications ("Pocket") filed a declaratory judgment action at the DPUC under Conn. Gen. Stat. § 4-176. Pocket sought a declaration that AT&T Connecticut was not in compliance with prior DPUC decisions and was violating Sections 251 and 252 of the federal Telecommunications Act of 1996 ("1996 Act" or "Act"), 47 U.S.C. §§ 251 and 252, based on the manner in which it provided "transit service" (also

called transiting). JA 2.[2] Various other telecommunications carriers also intervened in the proceeding.

On October 7, 2009 the DPUC issued its Decision ("DPUC Decision," JA 42-86), finding that the price AT&T Connecticut charged for transit service was in violation of 47 U.S.C. §§ 251 and 252 because transit service should be treated as "interconnection" under Section 251(c)(2) of the Act and had to be priced using the FCC's "Total Element Long-Run Incremental Cost" methodology (called "TELRIC," pronounced tell-rick).[3] The DPUC ordered AT&T Connecticut to immediately reduce the rates it charged other carriers under their contracts for transit service. JA 41-42, 84-85. On October 21, 2009 the DPUC issued an Errata modifying certain of the ordering paragraphs in its Decision. JA 87.

AT&T Connecticut then filed a complaint in the district court for the District of Connecticut alleging that the Decision was preempted by and inconsistent with federal law and state law. JA 104. After briefing on the merits, the district court, Judge Warren W. Eginton, issued its ruling, affirming the DPUC's Decision in part

[2] "JA" refers to the separate Joint Appendix.

[3] Section 252(d)(1) set the pricing standard both for direct interconnection required by Section 251(c)(2) and unbundled network elements required by Section 251(c)(3). 47 U.S.C. § 252(d)(1). The FCC implemented that pricing standard using TELRIC, a methodology based on the "hypothetical" cost of a "most efficient element," "untethered to" to either the incumbent's "historical investment" or the cost of the "actual network element being provided." *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 501 (2002). The TELRIC formula results in very low rates that are "well below the costs the [incumbents] had actually historically incurred in constructing the elements." *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 562 (D.C. Cir. 2004) (*"USTA II"*); *Illinois Bell Tel. Co. v. Box*, 548 F.3d 607-609 (7th Cir. 2008) (Posner, J.) (TELRIC rates are "just above the confiscatory level"). In upholding the FCC's TELRIC pricing methodogy in the context of Section 251(c)(3), the Supreme Court recognized that TELRIC rates were limited to "bottleneck elements." *See Verizon*, 535 U.S. at 510 & n.27, 515-17.

and reversing and remanding it in part. JA 66.[4] On May 6, 2011 AT&T Connecticut filed a timely notice of appeal. JA 183. On June 22, 2011, Cablevision Lightpath – Connecticut, Inc., Comcast Phone of Connecticut, Inc., and Cox Connecticut Telcom, LLC filed a joint notice of cross-appeal. JA 195.

BACKGROUND

A. The 1996 Act and Interconnection

Congress passed the 1996 Act to promote competition in all telecommunications markets, particularly in the market for local exchange service. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371-73 (1999). Toward that end, Section 251 of the Act establishes a three-tiered hierarchy of obligations on different types of carriers.[5] Section 251(a) imposes duties on all telecommunications carriers, whether long distance or local. 47 U.S.C. § 251(a). Section 251(b) imposes duties that apply only to local exchange carriers. *Id.*, § 251(b). And Section 251(c) imposes "additional obligations" that apply only to "incumbent" local exchange carriers ("ILECs" or "incumbent LECs"). *Id.*, § 251(c). Incumbent LECs are carriers, such as AT&T Connecticut, that had state-

[4] Memorandum of Decision, *The Southern New England Tel. Co. v. Perlermino*, No. 3:09-cv-1787 (WWE) (D. Conn. May 6, 2011) (JA 166-81). The reference to "Perlermino" is an error; it should be "Palermino." The district court reversed and remanded the requirement that AT&T Connecticut change the rates for transit service in its contracts with other carriers since the DPUC never reviewed the terms of those contracts. JA 178-80. That ruling is the subject of a cross-appeal.

[5] Relevant statutes are provided in the attached Statutory Addendum.

granted franchises to act as the exclusive providers of local service in a given area prior to the 1996 Act. *Id.*, § 251(h).

This case deals with transit service and whether it should be classified as "interconnection" under the 1996 Act. "Interconnection" is defined as "the linking of two networks for the mutual exchange of traffic." 47 C.F.R. § 51.5. In layman's terms, interconnection is the requirement that all carriers connect with one another so that end-user customers of any carrier can call end-user customers of other carriers. Two separate parts of Section 251 of the 1996 Act deal with "interconnection," but impose different obligations. These are subsections (a)(1) and (c)(2).

Section 251(a)(1) applies to all telecommunications carriers and requires them "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." 47 U.S.C. § 251(a)(1). "Direct" interconnection occurs when two carriers physically connect their own network equipment to each other in order to directly exchange calls between their respective end-user customers. With "indirect" interconnection, by contrast, two carriers pass traffic to one another through an intermediate carrier, rather than connecting to one another directly. Further Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd. 4685, ¶ 120 (2005). The intermediate carrier charges a fee for this use of its network,

which is known as transit service (or transiting). *Id.* Indirect interconnection via a transit service provider is an efficient way for two other carriers to interconnect when they do not send each other large amount of traffic. *Id.* at ¶¶ 125-26. The intermediate carrier has, historically, typically been the incumbent LEC (*id.*), but there are competing providers of transit service. In fact, the FCC recognized that the most recent data "indicates that a competitive market for transit services exists." Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd. 4554, ¶ 683 (2011).

Section 251(c)(2) also addresses interconnection, but in a different way. Specifically, while Section 251(a)(1) applies to all telecommunications carriers and to both direct and indirect interconnection, Section 251(c)(2) applies only to incumbent LECs and only to direct interconnection. Section 251(c)(2) gives any competing local exchange carrier ("CLEC") the right to directly interconnect its network "with the [incumbent local exchange carrier's] network" at any technically feasible point on the incumbent LEC's network for the mutual exchange of traffic between the CLEC's and incumbent LEC's end-user customers. 47 U.S.C. § 251(c)(2); First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, ¶ 997 (1996) (subsequent history omitted) ("*Local Competition Order*")

(describing interconnection under Section 251(c)(2) as "direct interconnection"); *see AT&T Corp.*, 525 U.S. at 371-72.

B. Implementation of the 1996 Act

While various states had experimented over time with ways to promote competition for local phone service, in 1996 Congress stepped in and used the 1996 Act as a way to create a uniform "pro-competitive, de-regulatory national policy framework" in all markets, including for local service. H.R. Report No. 104-458 at 113 (1996). In order to ensure a consistent nationwide framework, Congress gave the FCC the authority "to establish regulations to implement the requirements of [Section 251]." 47 U.S.C. § 251(d). This authority included establishing regulations for many areas that traditionally had been under state control, such as matters affecting local competition. Thus, as the Supreme Court recognized, "[w]ith regard to the matters addressed by the 1996 Act," the "Federal Government . . . unquestionably has" "taken the regulation of local telecommunications competition away from the States." *AT&T Corp.*, 525 U.S. at 378-79 n.6. Consequently, "the state commissions' participation in the administration of the new *federal* regime is to be guided by federal-agency regulations," and the FCC will "draw the lines" to which state commissions "must hew." *Id.* (emphasis in original). If a state commission fails to abide by the FCC's approach to Section 251 and local competition, the federal courts must "bring it to

heel." *Id.* The delegation of rulemaking authority to the FCC to implement Section 251 is so important that the FCC cannot sub-delegate that authority to state public utility commissions. *USTA II*, 359 F.3d at 565-68.

Nevertheless, the state public utility commissions do have a role under the 1996 Act, which is to apply and enforce the FCC's rules by arbitrating, approving, and enforcing contracts formed under the 1996 Act, which are called "interconnection agreements." Section 252 of the Act defines how an incumbent LEC's obligations under Section 251(c) and the FCC's rules and orders are implemented. The Section 252 framework is founded on two-party interconnection agreements. Under Section 252(a)(1) a competing carrier may ask an incumbent LEC to negotiate an interconnection agreement pursuant to Sections 251(b) and (c). *Id.*, § 252(a)(1). The incumbent LEC and the requesting carrier must then negotiate in good faith for at least 135-160 days. Consistent with the 1996 Act's strong preference for voluntary negotiation, during negotiation the parties may agree to any rates, terms, or conditions they like, "without regard to" Sections 251(b) and (c). *Id.*, § 252(a)(1). If the parties cannot negotiate all the necessary rates, terms, and conditions of an interconnection agreement, either party may ask the state public utility commission to arbitrate any "open issues" and resolve those issues consistent with Sections 251(b) and (c) of the Act and the FCC's implementing rules and orders. *Id.*, § 252(b).

During arbitration, a CLEC may request that the incumbent LEC's rates for interconnection and unbundled network elements ("UNEs") be set in accordance with Section 252(d) of the Act. 47 U.S.C. § 252(c)(2). The FCC has implemented Section 252(d) to require arbitrated rates for interconnection to an incumbent LEC to be based on the TELRIC methodology. *Local Competition Order*, 11 FCC Rcd. 15499 at ¶ 672; 47 C.F.R. § 51.505(b). The TELRIC methodology sets rates so low as to be barely above confiscatory levels. *Verizon*, 535 U.S. at 489.

Once an interconnection agreement is reached through negotiation and/or arbitration, it is submitted to the state public utility commission for approval. 47 U.S.C. § 252(e). Once approved, an interconnection agreement is kept on public file and other carriers may opt into the agreement if they so desire. *Id.*, § 252(i); 47 C.F.R. § 51.809.

C. Transit Service

As noted above, Section 251(a)(1) of the Act allows all telecommunications carriers to fulfill their interconnection duty by indirectly interconnecting to one another via an intermediate carrier. The intermediate carrier in this scenario is providing transit service. Specifically, transiting occurs when one carrier (the "originating" carrier) hands off traffic to an intermediate carrier (the transit service provider) at that carrier's tandem switch, and the transit provider then routes the call through its switch and transports the call to a third-party carrier (the

"terminating" carrier), which then delivers the call to its end-user customer. JA 44; *Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd. 4685 at ¶ 120. Transit traffic does not originate or terminate with the transit provider's end-user customers. Indeed, it does not involve the transit provider's end-user customers at all, because neither the originating carrier nor the terminating carrier is exchanging traffic with the transit provider. Rather, transiting is merely a service that a carrier provides to other carriers that have chosen not to directly interconnect with one another.

The 1996 Act does not mention transiting, and, despite many opportunities to do so, no FCC rule or order has ever required incumbent LECs to provide transit service. Rather, the FCC has repeatedly recognized that its rules and orders implementing Section 251 have not required incumbent LECs to provide transit service or specified any regulatory pricing methodology for transit service. Moreover, the FCC is currently considering several issues regarding whether, and if so how, to regulate transit service going forward, as part of the FCC's rulemaking authority under Section 251(d). *Connect America Fund*, 26 FCC Rcd. 4554 at ¶ 683; *Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd. 4685 at ¶¶ 125-33. Those rulemaking proceedings are still in process. Despite the absence of any legal duty, however, AT&T Connecticut voluntarily has provided transit service to carriers in Connecticut under interconnection

agreements and other contracts at mutually agreed, negotiated rates. JA 30. As a result, any carrier in Connecticut that wants transit service from AT&T Connecticut has been able to get it.

D. The DPUC's Declaratory Ruling

In December 2008, Pocket Communications filed a Petition for Declaratory Ruling with the DPUC. JA 2. Among other things, Pocket contended that AT&T Connecticut's transit service rate was not in compliance with a prior DPUC decision, and also was in violation of state law and Sections 251 and 252 of the 1996 Act. This proceeding became DPUC Docket No. 08-12-04.

The DPUC issued its Decision on October 7, 2009.[6] While Pocket's Petition had focused primarily on the alleged violation of a 2003 decision by the DPUC regarding transiting, the DPUC found that the rulings in that decision "were stayed, and as such, they could not have been violated by" AT&T Connecticut. JA 78-79.

Nevertheless, the Department went on to hold, without explanation, that transit service is part of interconnection under Section 251(c)(2) of the 1996 Act and must "be offered pursuant to 47 U.S.C. §§ 251 and 252 at [TELRIC]-based rates." JA 74-79, 82-84. The DPUC also "require[d]" AT&T Connecticut to immediately reduce its transit service rates for all carriers to TELRIC-based rates, regardless of the rates agreed to in their binding contracts with AT&T Connecticut.

[6] The Commissioners at the time the Decision was issued were Anthony J. Palermino, Kevin M. DelGobbo, and John W. Betoski, III.

JA 74-79, 82-84.[7] The DPUC did not explain how transit service could fit within the FCC's definition of interconnection. Nor did the DPUC explain how, since transiting is used only for indirect interconnection between non-ILECs, it could be treated as direct interconnection under Section 251(c)(2).

E. The District Court's Ruling

AT&T Connecticut challenged the DPUC's declaratory ruling in district court. Among other things, AT&T Connecticut argued that (i) the Decision was inconsistent with and preempted by the 1996 Act, (ii) transiting did not fall within the definition of interconnection in any event, and (iii) even if transiting fell within that definition it could only be required under Section 251(a)(1) of the Act, since that is the only provision that deals with indirect interconnection. AT&T Connecticut also argued that the requirement to immediately reduce its transiting rates for all carriers, despite AT&T Connecticut having binding contracts where those carriers voluntarily agreed to different rates, violated the 1996 Act's provisions on interconnection agreements. Finally, AT&T Connecticut argued that the Decision exceeded the DPUC's authority under the state statute governing declaratory rulings.

[7] The FCC rules implementing Section 252(d) of the 1996 Act refer only to the TELRIC pricing methodology. *See* 47 C.F.R. § 51.505(b). The DPUC, however, has elected to use the term "TSLRIC" ("Total Service Long Run Incremental Cost") for its preferred methodology under Section 252(d) and the FCC's rules. For purposes of this proceeding, TSLRIC and TELRIC generally were used interchangeably.

The district court upheld the DPUC's Decision in part and reversed and remanded in part. It upheld the DPUC's rulings that transit service should be classified as interconnection under Section 251(c)(2) and must be provided at a TELRIC-based rate, concluding that "Section 251(c) includes the duties to provide indirect interconnection and to provide transit service." JA 171-76. The Court also found, however, that the DPUC erred in forcing AT&T Connecticut to immediately charge lower rates to all carriers when there was no evidence of a violation of any of its interconnection agreements with those carriers, and remanded for the DPUC to evaluate the specifics of those interconnection agreements. JA 177-80. The Court never addressed AT&T Connecticut's independent argument that transiting could at most be regulated only under Section 251(a)(1) of the 1996 Act (the only section that applies to indirect interconnection), or AT&T Connecticut's state-law argument that the DPUC Decision exceeded the DPUC's authority under the Connecticut declaratory ruling statute.

STANDARD OF REVIEW

This case involves questions of law. The DPUC's and district court's conclusions regarding questions of law are reviewed *de novo*. *Global NAPs, Inc. v. Verizon New England, Inc.*, 454 F.3d 91, 96 (2d Cir. 2006); *Islander East Pipeline Co., LLC v. Connecticut Dept. of Envt'l Protection*, 482 F.3d 79, 94 (2d Cir. 2006).

SUMMARY OF ARGUMENT

1. The DPUC, a state public utility commission, declared that, as a matter of federal law, transit service must be regulated as "interconnection" under Section 251(c)(2) of the 1996 Act. In doing so, however, the DPUC overlooked that Congress gave the FCC the authority to establish the requirements of Section 251, including those regarding interconnection, and that despite many opportunities to do so the FCC has always declined to require transit service to be regulated as if it were interconnection. Moreover, the FCC recently indicated that the market for transit service is competitive and is reviewing comments in a pending rulemaking proceeding to decide whether, in light of this competition, transit service could or should be regulated at all under Section 251. Given the structure of the 1996 Act and the FCC's hands-off approach to transit service thus far, the DPUC's Decision conflicts with federal law and the methods Congress chose to implement the 1996 Act, and therefore is preempted.

2. Even if the DPUC's Decision were not preempted for the above reasons, it still would have to be consistent with the 1996 Act and the FCC's affirmative rules, and it is not. Transit service does not fall within the FCC's definition of "interconnection" under Section 251. That definition requires interconnection to be used for the "mutual exchange" of traffic between the two interconnected carriers, but transit service is not. Rather, a transit service provider

is merely a conduit between the two interconnected carriers, and is not "mutually exchanging" any of *its* end-user customers' traffic with other carriers via transit service. Rather, the transit service provider exchanges its end-user customers' traffic with other carriers via direct interconnection, which it provides at a separate price from transit service.

3. Even if transit service could fall within the definition of interconnection under the Act, the next question – a critical one – is whether transit service would fall under Section 251(a)(1) or Section 251(c)(2). The distinction is significant because different pricing regimes apply under these two provisions, yet the DPUC and district court never addressed which provision ought to apply. As the text of Section 251 makes plain, transiting could at most be regulated under Section 251(a)(1), because transiting is used only to facilitate "indirect" interconnection and Section 251(a)(1) is the only part of Section 251 that requires indirect interconnection. Thus, the DPUC erred in finding that transiting had to be regulated under Section 251(c)(2) rather than Section 251(a)(1).

4. Finally, the DPUC's Decision exceeded its authority. The proceeding at the DPUC was conducted under Connecticut's declaratory ruling statute and the DPUC's associated rules. The state statute and DPUC rules, however, (i) do not authorize the DPUC to issue declarations on matters of federal law, as it did here; (ii) do not authorize the DPUC to issue declarations regarding the obligations of

parties other than the petitioner, as it did here; and (iii) do not authorize the DPUC to impose remedial measures and require immediate action, as it did here.

ARGUMENT

I. THE DPUC'S DECISION IS PREEMPTED BY THE 1996 ACT.

A. The FCC Has Thus Far Elected Not to Regulate Transit Service Under Section 251, and the DPUC's Ruling Conflicts With This National Approach.

There is a clear conflict between the DPUC's treatment of transit service under Section 251, on the one hand, and, on the other, the FCC's treatment of transit service and the method the FCC has chosen for dealing with transiting on a national basis. *Every time* the treatment of transiting under Section 251 has arisen as an issue, the FCC has said that it sees no requirement to provide transiting as interconnection under Section 251. In multiple cases where it had to determine whether an incumbent LEC was providing interconnection that satisfied Section 251, the FCC has said "we find no clear Commission precedent or rules declaring such a duty." *Application of Qwest Comms. Int'l, Inc.*, 18 FCC Rcd. 7325, n.305 (2003); *Application of BellSouth Corp.*, 17 FCC Rcd. 25828, ¶ 155 (2002) (same); *Joint Application by BellSouth Corp., et al.*, 17 FCC Rcd. 17595, n.849 (2002) (same). The FCC therefore held in those cases that incumbent LECs satisfied their duty to provide interconnection under Section 251(c)(2) regardless of whether they provided transit service. *Application of BellSouth*, 17 FCC Rcd. 25828 at ¶ 155;

Application of Qwest, 18 FCC Rcd. 7325 at n.305.[8] Thus, the FCC's national approach to transit service thus far has been hands-off – consistent with the "pro-competitive, de-regulatory national policy framework" of the 1996 Act. H.R. Rep. No. 104-458 at 113.

Furthermore, to the extent transit service might be regulated under Section 251 in the future, the FCC has asserted jurisdiction over that issue and is considering it in pending rulemakings, where it has asked the industry for comments on a comprehensive range of issues. In 2001, the FCC sought comment on issues that arise under intercarrier compensation rules when calls involve a transit service provider, and how different billing and pricing approaches might apply. Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd. 9610, ¶ 71 (2001). Likewise, in a 2003 rulemaking notice the FCC reiterated that its "rules have not required incumbent LECs to provide transiting," but that it planned to address transiting in its pending intercarrier compensation rulemaking proceeding. Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978, at n.1640 (2003) (subsequent history omitted).

[8] The cited cases involved the FCC's evaluation of the incumbent LEC's satisfaction of Section 271(c) of the 1996 Act, which requires the incumbent LEC to show that it is providing "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)." 47 U.S.C. § 271(c)(2)(B)(i).

During the intercarrier compensation rulemaking in 2005, the FCC requested comments from the industry on a wide range of transiting issues, including:

- Whether the 1996 Act creates "legal authority to impose transiting obligations" under Section 251;
- If one assumed the FCC had the statutory authority to impose a transiting obligation, whether the FCC "should exercise that authority to require the provision of transit service";
- Whether, "[i]f rules regarding transit service are warranted," what "the scope of such regulation" should be and whether there was a "need for rules governing the terms and conditions for transit service offerings";
- If the FCC determined that rules governing transit service were warranted under Section 251, what "the appropriate pricing methodology" for transit service would be.

Developing a Unified Intercarrier Compensation Regime, 20 FCC Rcd. 4685 at ¶¶ 125-33. Each of these broad areas also had various sub-issues that the FCC asked the industry to comment on.[9] In 2008, the FCC sought further comment on

[9] These sub-issues included:

- "[W]hether th[e] definition [of interconnection in 47 C.F.R. § 51.5] applies, or should apply, in the context of section 251(a)," *id.* at ¶ 128;
- "[W]hether . . .section 251(a) should be read to encompass an obligation to provide transit service," *id.*;
- "To whom would that implied obligation run," *id.*;
- Whether there are "any other arguments concerning the [FCC's] legal authority to impose transiting obligations," *id.* ;
- "[W]hether a transiting obligation could also arise under section 251(b)(5) or other sections of the Act," *id.* ;
- Whether there would be any "other regulatory implications of the [FCC's] conclusions on this issue," *id.*;

transit service. Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, *High-Cost Universal Service Support*, 24 FCC Rcd. 6475, App. A ¶ 347 and App. C ¶ 344 (2008). Finally, in 2011, just a few months ago, the FCC recognized "the record in [its most recent] proceeding indicates that a competitive market for transit services exists." *Connect America Fund*, 26 FCC Rcd. 4554 at ¶ 683. "In light of these changes in the transit market," the FCC "invite[d] parties to refresh the record with regard to the need for the [FCC] to regulate transiting service, and the [FCC's] authority to do so." *Id.* Several carriers have since filed comments with the FCC in that rulemaking, debating whether and how transiting could or should be regulated under Section 251 as a matter of national policy, and the FCC is now considering those filings. The FCC's multiple, exhaustive requests for comment on transiting prove that it views the issue as being within its authority and responsibility as the agency assigned by

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- "[T]he extent to which providers (including non-incumbent LECs) make transit service available in the marketplace at reasonable rates, terms, and conditions, and the extent to which rules implementing transit service obligations are warranted at this time," *id.* ¶ 129;
- "[C]omment on the possibility that mandated transiting or regulated rates for such service might discourage the development of this market," *id.*;
- "[C]omment on whether any rules adopted should encourage the provisions of transit service by carriers other than incumbent LECs and, if so, how," *id.*;
- "[W]hether transit service obligations under the Act [if any] should extend solely to incumbent LECs or to all transit service providers, including competitive LECs," *id.* ¶ 130;
- Whether such rules "would create arbitrage risks or result in an unfair competitive advantage," *id.*;
- "[W]hether limitations on transit service obligations should be considered and the legal authority for imposing such limitations if transit service rules are adopted," *id.*

Congress to create the rules necessary to implement Section 251. *See* 47 U.S.C. § 251(d).

Given that the FCC has thus far declined to treat transiting as interconnection under the 1996 Act, and has asserted authority over any potential regulation of transiting in the future, the DPUC was preempted from asserting that same authority and imposing new transiting obligations in the name of Section 251 on its own, for that undermines and conflicts with federal law and policy. As a result of the Constitution's Supremacy Clause, preemption arises when a state-imposed requirement conflicts with or undermines the requirements of federal law or interferes with the methods established by a federal statute to achieve its goals. Where a federal agency "consciously has chosen not to mandate" particular action, its decision preempts states from mandating that very thing. *Fidelity Fed. Sav. & Loan v. De la Cuesta*, 458 U.S. 141, 155 (1982); *see Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 874-75 (2000) (where federal agency "deliberately provided the manufacturer with a range of choices" among safety devices, state could not require airbags in all cars or contend that "the more airbags . . . the better"); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 171-72, 178 (1978) (states must follow federal agency choices if a federal agency "has either promulgated [its] own [ ] requirement . . . or has decided that no such requirement should be imposed at all.").

These principles have been applied frequently under the 1996 Act, for with respect to matters covered by the 1996 Act, Congress has "precluded all other regulation except on its terms," *MCI*, 222 F.3d at 343, and left it to the FCC to draw "the lines" to which state commissions "must hew." *AT&T Corp.*, 525 U.S. at 378-79 n.6. Nothing in the 1996 Act gives states authority to impose requirements based on the state commission's own reading of the Act in proceedings (like the declaratory ruling action here) that do not involve the state commission exercising its delegated authority to arbitrate, approve, and enforce interconnection agreements. "[U]nder the [1996] Act, there has been no delegation to state commissions of the power to fill gaps in the statute through binding rulemaking." *MCI Telecomm. Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 516 (3d Cir. 2001). Rather, the power "to fill statutory gaps was granted to the FCC." *Id.*; *see also AT&T Corp.*, 525 U.S. at 378-79 nn.6, 10 (under 1996 Act, state commissions cannot simply "do their own thing," but rather must abide by FCC's implementation of Section 251, and states are delegated authority in only a "few specified areas," such as the formation of interconnection agreements).

Likewise, when a state commission decides to interpret Section 251 to impose a generic duty on incumbent LECs that the FCC has *not* read Section 251 to impose, the state commission "exceed[s] the reservation of authority [to the states]" under the Act and is therefore preempted. *See* Memorandum Opinion and

Order, *BellSouth Telecomms. Inc. Request for Declaratory Ruling*, 20 FCC Rcd. 6830, ¶ 27 (2005). "[S]tate decisions that impose such an obligation are inconsistent with and substantially prevent the implementation of the Act and the [FCC]'s . . . rules and policies." *Id.*, ¶ 1; *Illinois Bell Tel. Co. v. Box*, 548 F.3d 607, 611-13 (7th Cir. 2008). The same analysis applies here.

B. The District Court's Rationale Is Incorrect.

The district court found that federal law did not preempt the DPUC's transiting rule because, in the court's view, the FCC's statements regarding transiting were "dicta" and did not constitute a "definitive rule" because the FCC "never addressed the question directly" of whether transiting could be treated as part of interconnection. JA 171-74. The district court said this because the FCC typically preceded its statements that it sees no precedent or rule requiring transiting to be treated as interconnection by saying that it has not had occasion to determine whether incumbent LECs have a duty to provide transit service under section 251(c)(2). JA 171. That, however, does not mean there is no conflict between the DPUC's approach to transiting and the FCC's approach to transiting. There plainly is. The undisputed fact is that *every time* the FCC has been confronted with a claim that transiting is part of interconnection it has said that it finds no clear precedent or rules declaring such a duty. This means that at present incumbent LECs, like AT&T Connecticut, have no federal-law obligation to

provide transit service – yet that is exactly what the DPUC purported to find and impose based on its own view of federal law (not the FCC's). That is a conflict, for the DPUC is applying Section 251 and FCC rules differently than the FCC does, and imposing duties under Section 251 that the FCC has declined to impose.

Moreover, the FCC does not have to more formally decline to issue rules on transiting for the DPUC's Decision to be preempted. A recent Supreme Court decision shows why. In *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011), various parties argued that, even though a federal statute gave the EPA power to regulate carbon-dioxide emissions from power plants (just as Section 251(d) gives the FCC sole power to issue requirements implementing Section 251), and even though the EPA was in the midst of a pending rulemaking on those very standards (just as the FCC is with regard to transiting), those power-plant owners could still be sued for excess emissions under federal common law until the EPA "actually exercises its regulatory authority" and "sets standards governing emissions from the defendants' plants." *Id.* at 2538. The Supreme Court disagreed, explaining that "[t]he critical point is that Congress delegated to [the] EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law." *Id.* Indeed, the delegation from Congress meant that federal common law would be displaced even if the EPA were to "decline to regulate altogether." *Id*. at 2538-39.

The same analysis applies here to displace the DPUC's assertion of authority to issue generic declaratory rulings about the requirements of the 1996 Act. In order to establish a uniform national competitive policy framework, Congress gave the FCC the power to establish regulations to implement Section 251 of the 1996 Act. 47 U.S.C. § 251(d); *USTA II*, 359 F.3d at 565-69. Interconnection is one of the matters covered by Section 251, and therefore one of the matters as to which the FCC is assigned the task of drawing the lines to which state commissions must hew. The FCC has said that it sees nothing that clearly requires transiting as part of interconnection, and has taken transiting issues under its wing in pending rulemakings under Section 251. Moreover, as the FCC recognized in seeking comment on transiting issues in its rulemaking cases, decisions about whether and how to regulate transiting under Section 251 may require complex balancing of competing concerns, such as the desire to make transiting available at a reasonable price without impeding competition among transiting providers. *See Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4685 at ¶ 129-32 (seeking Comment on different pricing and regulatory approaches and their potential effect on promoting or impeding competition in transit service). Congress designated the FCC to make such policy-laden balancing decisions. *See USTA II*, 359 F.3d at 565-66.

The district court also sought to justify its ruling by asserting that the FCC "has started to reconsider [its] approach" of not regulating transit service as if it were interconnection, referencing one of the rulemaking proceedings where the FCC sought comment on transiting. JA 171-72. But nothing in that rulemaking notice indicated any "reconsideration" of the FCC's approach. All the FCC did is ask for comment from the nationwide industry on whether, and if so how and to what extent, transiting might be regulated under Section 251. *See Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd. 4685 at ¶¶ 120-33. The FCC did not in any way indicate that it was departing from its prior view. Rather, noting a difference of opinion in the industry on whether transiting was subject to Section 251 at all, the FCC sought input. In doing so, the FCC highlighted a range of issues to consider, but nowhere did it say that any part of Section 251 actually requires transiting as part of interconnection today.

For all of these reasons, the DPUC's Decision conflicts with and undermines the FCC's approach to transiting. The proper course would have been for the DPUC to decline to rule on the issue at all. In fact, the FCC's Wireline Competition Bureau, acting in the role of a state commission, did just that. In a case where it took over an interconnection agreement arbitration for a state commission, and therefore "st[ood] in the shoes" of a state commission under the Act, the Wireline Competition Bureau was asked to find that transiting was a

required part of interconnection under Section 251(c)(2) and must be provided at TELRIC-based rates. *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5)*, 17 FCC Rcd. 27039, ¶ 108 (Wireline Competition Bureau, 2002) ("*Virginia Arbitration Order*").[10] It declined to do so, explaining as follows:

> While Verizon as an incumbent LEC is required to provide interconnection at forward-looking cost under the [FCC's] rules implementing section 251(c)(2), the [FCC] had not had occasion to determine whether incumbent LECs have a duty to provide transit service under this provision of the statute, nor do we find clear [FCC] precedent or rules declaring such a duty. ***In the absence of such precedent or rule, we decline, on delegated authority, to determine for the first time that Verizon has a section 251(c)(2) duty to provide transit service at TELRIC rates. Furthermore, any duty Verizon may have under section 251(a)(1) of the Act to provide transit service would not require that service to be priced at TELRIC.***

Id., ¶ 117 (footnotes omitted, emphasis added). Following the rationale of this decision, a district court affirmed another state commission's refusal to treat transiting as Section 251(c)(2) interconnection in the absence of an FCC rule or precedent requiring it, finding that "TELRIC pricing is not required for transit service rates. . . . Therefore, as a legal matter, the Board was correct in holding that it was not required to apply TELRIC rates." *WorldNet Telecomms., Inc. v.*

[10] When a state commission declines to arbitrate an interconnection agreement under Section 252, the FCC may arbitrate the interconnection agreement on its own. 47 U.S.C. § 252(e)(5). In such instances, the FCC typically assigns the arbitration to its Wireline Competition Bureau, which "stand[s] in the shoes of a state commission" and has the same authority as a state commission. *See Virginia Arbitration Order*, 17 FCC Rcd. 27039 at ¶¶ 1, 703.

Telecommunications Regulatory Bd. of Puerto Rico, 2009 WL 2778058, *28 (D.P.R. 2009). The DPUC should have done the same.[11]

II. THE DPUC ERRED AS A MATTER OF LAW BECAUSE TRANSITING DOES NOT FALL WITHIN THE ACT'S DEFINITION OF INTERCONNECTION.

Even if the DPUC could supersede the FCC and declare that transit service qualifies as interconnection, the DPUC's Decision still violates the 1996 Act because transiting does not fall within the definition of "interconnection."

The DPUC based its alleged authority over transit service on the theory that transiting qualifies as interconnection under Section 251(c)(2). JA 74, 79, 82-83. The Decision, however, contains no discussion of the definition of interconnection, and no attempt to explain how transiting could fall within that definition. That is because it cannot. The FCC defines "interconnection" as "the linking of two networks for the mutual exchange of traffic." 47 C.F.R. § 51.5. Transit service does not fall within this definition because it does not involve the linking of a competing carrier's network to AT&T Connecticut's network "for the mutual exchange of traffic" with AT&T Connecticut.

[11] The district court noted that various other state public utility commissions have held that transiting is to be treated as interconnection, and some have said it is subject to TELRIC-based pricing. JA 177. None of those decisions, of course, is binding here, and therefore they could at most be entitled to only such weight as their analysis deserves. As it turns out, the state commission decisions contain little or no analysis of the issues raised in this case. As a more general matter, it is no surprise that various state commissions have viewed themselves as having broad powers even after the 1996 Act – yet that is precisely why the federal courts are needed to "bring to heel" any state agencies that overstep their authority under the 1996 Act's "new *federal* regime." *AT&T Corp.*, 525 U.S. at 378-79 n.6 (emphasis in original).

As described above, transit service involves AT&T Connecticut acting only as the intermediary between the networks of two other carriers (namely, the "originating" carrier and the "terminating" carrier). AT&T Connecticut does not use transit service to "mutually exchange" its end-user customers' traffic with either of those other two carriers, for AT&T Connecticut does not use transit service to send its end-user customers' traffic to or from those other two carriers. Rather, AT&T Connecticut has its own direct interconnection arrangements with each of those other two carriers, provided for a separate charge from transit service, and those are the connections it uses to mutually exchange its end-user customers' traffic with customers of the other carriers. AT&T Connecticut's transit service, by contrast, exists only to provide the means through which two *other* carriers send calls back and forth to one another. JA 83 (transiting is used to allow carriers other than AT&T Connecticut "to route traffic between their respective networks"). It is those *other* two carriers that are "mutually exchang[ing]" traffic with one another.

The district court did not accept the "mutual exchange" point, stating that as long as transiting is involved in the mutual exchange of traffic between *any* two carriers, it is part of interconnection under Section 251. JA 176. That, however, ignores what transit service actually *is* and how it is separate from interconnection. Read logically, interconnection for the "mutual exchange" of traffic can only refer

to the exchange of traffic between the carrier whose customer originates the call and the second carrier that terminates the call to one of its customers. *Those* are the two carriers that are interconnecting to one another to mutually exchange traffic. The carrier providing transit service, however, is neither the originating carrier nor the terminating carrier. It is just a middleman providing a separate service that two other carriers voluntarily choose to use to send traffic to one another instead of interconnecting directly. Significantly, transit service is provided for a separate charge than either the originating or terminating carrier pays to interconnect to and mutually exchange traffic with the transit service provider. That is, transit service is not part of either the originating carrier's or the terminating carrier's interconnection to the incumbent LEC, but rather is a separate service. It is not interconnection itself.

III. AT MOST, TRANSITING COULD ONLY BE TREATED AS INTERCONNECTION UNDER SECTION 251(A)(1).

Even if transiting could be classified as interconnection (which it cannot), the next question would be whether transiting should be treated as interconnection under Section 251(a)(1) or Section 251(c)(2). Both of these sections deal with interconnection, but in different circumstances. The distinction between Section 251(a)(1) and Section 251(c)(2) is critical, for if transiting falls under Section 251(a)(1) it is *not* subject to TELRIC-based pricing. *See Virginia Arbitration Order*, ¶ 117. Indeed, the "251(a)(1) vs. 251(c)(2)" issue is one of the transiting

issues on which the FCC sought comment in its pending rulemaking. *Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd. 4685 at ¶¶ 127-28. The DPUC and the district court, however, never addressed this issue.

As noted above, transiting is used *only* to facilitate *indirect* interconnection, where the transit service provider acts as an intermediary between the originating carrier and the terminating carrier. *Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd. 4685 at ¶¶ 120, 125, 128. The *only* part of Section 251 that addresses indirect interconnection is Section 251(a)(1), which requires all telecommunications carriers to interconnect with other carriers either "directly or indirectly." 47 U.S.C. § 251(a)(1). Section 251(c)(2), by contrast, does not require indirect interconnection. Rather, it deals only with an incumbent LEC's obligation to allow a requesting carrier to connect its "facilities and equipment" to the incumbent LEC's network, *i.e.*, direct interconnection. 47 U.S.C. § 251(c)(2); *Local Competition Order*, 11 FCC Rcd. 15499 at ¶ 997 (describing interconnection to an incumbent LEC under Section 251(c)(2) as "direct interconnection").

Similarly, the FCC has recognized from the start that "[t]he interconnection obligations under section 251(a) *differ from* the obligations under section 251(c)" because, among other things, only Section 251(a)(1) addresses indirect interconnection. *Local Competition Order*, 11 FCC Rcd. 15499 at ¶ 997 (emphasis

added). The FCC also has found that "[t]he express language and structure of section 251 compel rejection of" any approach that treats subsections (a)(1) and (c)(2) as imposing the same duties, since that would "contravene the carefully-calibrated regulatory regime crafted by Congress" in Section 251. Declaratory Ruling and Notice of Proposed Rulemaking, *Guam Public Utils. Comm'n*, 12 FCC Rcd. 6925, ¶ 19 (1997). Given that Sections 251(a)(1) and 251(c)(2) address different classifications of carriers, impose different obligations and use different language – and given that *only* Section 251(a)(1) requires indirect interconnection, which is the *only* type of interconnection transit service could be used with – the only part of Section 251 that could apply to transit service is Section 251(a)(1).

As noted above, the DPUC and district court did not address the distinction between Section 251(a)(1) and Section 251(c)(2). Instead, both the DPUC and the district court decided that transiting should be regulated under Section 251(c)(2), and therefore subject to low TELRIC-based rates, because they assumed that would be the best way to keep interconnection costs low to promote competition. *See* JA 75-76, 174-75.

The first problem with that approach is that it is not supported by the language in the 1996 Act, which addresses indirect interconnection only in Section 251(a)(1) (as shown above). The second problem is that state commissions (and district courts reviewing them) do not have the authority to simply do whatever

they like under the 1996 Act in the name of serving the general goal of promoting competition. As the Seventh Circuit recognized in finding that another state commission's blanket requirement imposed in the name of competition was preempted by the 1996 Act, for a state commission to simply "identify the policy underlying a statute and then run with it is a dangerous method of interpretation," for "it is likely to run roughshod over the compromise between interest groups that enabled the statute to be passed in the first place." *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 445 (7th Cir. 2003). Moreover, the courts have emphasized that it is the *FCC* that must make the complex balancing decisions in deciding whether imposing a requirement under the 1996 Act is in the best interest of consumers and competition or would impede the development of competition. *USTA II*, 359 F.3d at 565-66 (allowing state commission to determine what Section 251 requires "increases the risk that these parties will not share the agency's 'national vision and perspective' . . . and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme.").

The FCC is already considering these very types of policy balancing issues in its review of transit service. *Development of a Unified Intercarrier Compensation Regime*, 20 FCC Rcd. 4685 at ¶¶ 125-33. In fact, the FCC recently said that the transit service market appears competitive, *Connect America*, 26 FCC Rcd 4554 at ¶ 683, which could well affect its ultimate regulatory policy decision.

Indeed, the Supreme Court and D.C. Circuit have previously vacated FCC-imposed duties under Section 251 that did not adequately account for competition, recognizing that regulated TELRIC-based rates are so low they can actually impede the growth of competition in such markets and that no regulator can assume "more . . . is better" when it comes to imposing TELRIC-based pricing on incumbent LECs. *See United States Telecom Ass'n v. FCC*, 290 F.2d 415, 425 (D.C. Cir. 2001). Contrary to the DPUC's and district court's assumptions, then, making transit service subject to TELRIC-based pricing could actually *harm* competition in the market for transit service and undermine the goals of the 1996 Act – which is why such decisions were left to the FCC under Section 251(d).

In short, it was legal error for the DPUC to conclude that transit service, if deemed to be interconnection under Section 251 at all, is subject to Section 251(c)(2) rather than Section 251(a)(1).

IV. THE DECISION EXCEEDS THE DEPARTMENT'S AUTHORITY REGARDING DECLARATORY RULINGS.

A final, independent basis for reversing the DPUC's Decision is that the Decision was not authorized by the Connecticut declaratory ruling statute under which it was issued. Because nothing in the declaratory ruling statute (and nothing in the 1996 Act) gave the DPUC the authority to issue a declaratory ruling on the meaning of Section 251 and have it apply to AT&T Connecticut, the Decision was outside the scope of the DPUC's authority.

Like all state agencies, the DPUC's authority is limited to that delegated to it by the Connecticut legislature. *Tele Tech of Connecticut Corp. v. DPUC*, 855 A.2d 174, 181 (Conn. 2004). Here, however, the DPUC did not abide by the governing statute, or even its own rules.

The proceeding below was initiated pursuant to Pocket's Petition for Declaratory Ruling under Conn. Gen. Stat. § 4-176. Section 4-176 authorizes the DPUC to issue declaratory rulings only on certain type of questions specified in the statute. Specifically, subsection (a) provides:

> § 4-176. Declaratory rulings. Petitions. Regulations.
>
> (a) Any person may petition an agency, or an agency may on its own motion initiate a proceeding, for a declaratory ruling *as to the validity of any regulation, or the applicability to specified circumstances of a provision of the general statutes, a regulation, or a final decision on a matter within the jurisdiction of the agency*. . . . (Emphasis added).

The DPUC's own rules for declaratory ruling proceedings, which aptly refer to a declaratory ruling as an "advisory ruling," specify that "[a]ny interested person may at any time request an advisory ruling of the commissioners with respect to the applicability *to such person* of any statute, regulation or order enforced, administered or promulgated by the commissioners." DPUC Rule § 16-1-114 (emphasis added) (included in Statutory Addendum). Section 4-176 and the

DPUC's implementing rules limit the DPUC's authority in declaratory ruling cases. The DPUC exceeded that authority here.

First, the DPUC may issue a declaratory ruling only with respect to *state* law. Yet the DPUC's Decision declared that AT&T Connecticut was in violation of *federal* law and used that as the basis for ordering relief. Section 4-176 does not give the DPUC any authority to issue declarations with regard to federal law. The statute refers to "the general statutes," meaning the Connecticut General Statutes, and "a regulation," which can only mean the DPUC's regulations. It also refers to the applicability of "a final decision" by the DPUC, but again that refers only to the applicability of the decision to the petitioner, not to a non-party like AT&T Connecticut. Moreover, the DPUC found that AT&T Connecticut had not violated any prior DPUC ruling. JA 78-79. Once it decided that issue the case should have been over, but the DPUC went on to declare that AT&T Connecticut was in violation of the DPUC's view of federal law (JA 79-81) – something the Connecticut declaratory ruling statute does not give it authority to do.

The Connecticut courts expect state agencies to stay within the limitations the Legislature established in Section 4-176. As the Connecticut Supreme Court explained in *Hill v. Connecticut State Employees Retirement Comm'n*, 83 Conn. App. 599, 606, 851 A.2d 320, 324 (Ct. App. 2004), the idea that "a petitioner for declaratory ruling may obtain relief for any claim of any kind that he or she may

choose to present to an administrative agency" is simply wrong. Yet that is exactly how the DPUC treated Pocket's Petition for Declaratory Ruling here, as an opening to address "any claim of any kind" against anyone.

Second, the DPUC's rules provide that the DPUC can issue declaratory rulings only with respect to matters the legislature identified in Conn. Gen. Stat. § 4-176, including "the applicability" of any statute, regulation, or order "*to such person*" (*i.e.*, the person filing the request for a declaratory ruling). DPUC Rule § 16-1-114. Thus, a declaratory ruling case cannot be used to declare the applicability of a statute, regulation, or order to some *other* person. And that makes perfect sense. The purpose of the declaratory ruling process is to allow an entity to determine whether a regulation is valid or whether some statute, regulation, or order applies *to it* in specified circumstances. For example, a party might seek a declaratory ruling by asking whether statute X applies to it in circumstance Y. A declaratory ruling petition is not, however, a tool to use against others (such as a competitor) to challenge their compliance with the law or have obligations imposed on them.[12]

[12] Section 4-176 and the DPUC's rules underscore this point. Section 4-176 does not even contemplate that there will be a respondent in a declaratory ruling case. There is no mention of a respondent anywhere in the statute, and subsection (d) merely allows other parties to voluntarily intervene. Similarly, Section 16-1-115(a) of the DPUC's rules on declaratory ruling cases merely provides that the Department "*may* give notice to any person that an advisory ruling has been requested" and "*may* receive and consider data, facts, arguments and opinions from persons other than the person requesting the ruling." It would make no sense to allow entities to use the declaratory ruling statute to seek to impose obligations against a competitor, yet have no provision that automatically allowed the competitor to become a party.

The Decision ignored this limitation. Pocket's Petition did not ask the DPUC to determine the applicability of anything to *Pocket*. Rather, it asked the DPUC to declare the "applicability" of state law, federal law, and past orders to *AT&T Connecticut*. And that is what the DPUC did, overlooking the fact that even its own rules did not allow it to declare anything about anyone except Pocket.

Third, the Petition did not merely seek to determine the "applicability" of any authority to Pocket in specified circumstances. Rather, as the Decision repeatedly recognizes, Pocket asked the DPUC to declare that *AT&T Connecticut* was *"in violation of"* various authorities. JA 78. As shown above, however, and as the DPUC's own rules state, an advisory ruling can only be issued to decide the *applicability* of a statute, regulation, or order to the entity that filed the Petition, *i.e.*, Pocket. A request by one entity to find that another entity has "violate[d]" the law has to be brought as a complaint, not a declaratory ruling petition. Indeed, the repeated references to the advisory ruling that the DPUC may issue underscore that proceedings for declaratory rulings are not a forum for resolving substantive complaints by one party against another or for imposing any remedial relief or setting rates. The petitioner makes an inquiry (not an allegation of a claim), and the DPUC can, in response, provide an advisory ruling to the inquiring party – but that is as far as the DPUC is permitted go. The DPUC ignored this limitation of the statute and its own rules, and thereby exceeded its authority.

CONCLUSION

For the reasons stated herein, the district court's Decision should be reversed on the issues addressed herein and remanded to the district court with direction to vacate the DPUC's Decision.

Dated: September 23, 2011

Respectfully submitted,

By: /s/ J. Tyson Covey

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CERTIFICATE OF COMPLIANCE

I, J. Tyson Covey, attorney of record for Appellant AT&T Connecticut, do hereby certify that the foregoing brief complies with the type-volume limitation as set forth in Fed. R. App. P. 32(a)(7). The total number of words in the foregoing brief is 9315.

/s/ J. Tyson Covey

CERTIFICATE OF SERVICE

The undersigned, counsel for Appellee, hereby certifies that a complete copy of the foregoing BRIEF FOR PLAINTIFF-APPELLANT-CROSS-APPELLEE THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY, and Joint Appendix, was served by electronic transmission on counsel for all Appellees, listed below.

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STATUTORY ADDENDUM

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Effective: October 26, 1999

United States Code Annotated Currentness
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Chapter 5. Wire or Radio Communication (Refs & Annos)
Subchapter II. Common Carriers (Refs & Annos)
Part II. Development of Competitive Markets (Refs & Annos)
§ 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty--

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point

on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty--

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether--

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(3) Universal emergency telephone number

The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on October 26, 1999.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) of this section, from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification--

(A) is necessary--

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) Definition of incumbent local exchange carrier

(1) Definition

For purposes of this section, the term ‘incumbent local exchange carrier’ means, with respect to an area, the local exchange carrier that--

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if--

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

CREDIT(S)

(June 19, 1934, c. 652, Title II, § 251, as added Feb. 8, 1996, Pub.L. 104-104, Title I, § 101(a), 110 Stat. 61; Oct. 26, 1999, Pub.L. 106-81, § 3(a), 113 Stat. 1287.)

Current through P.L. 112-28 approved 8-12-11

END OF DOCUMENT

Effective: February 8, 1996

United States Code Annotated Currentness
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Chapter 5. Wire or Radio Communication (Refs & Annos)
Subchapter II. Common Carriers (Refs & Annos)
Part II. Development of Competitive Markets (Refs & Annos)

§ 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning--

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall--

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section--

(A) shall be--

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed--

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that--

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection

(d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission--

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) "Incumbent local exchange carrier" defined

For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) of this title.

CREDIT(S)

(June 19, 1934, c. 652, Title II, § 252, as added Feb. 8, 1996, Pub.L. 104-104, Title I, § 101(a), 110 Stat. 66.)

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END OF DOCUMENT

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Code of Federal Regulations Currentness
Title 47. Telecommunication
Chapter I. Federal Communications Commission (Refs & Annos)
Subchapter B. Common Carrier Services
Part 51. Interconnection (Refs & Annos)
Subpart A. General Information
§ 51.5 Terms and definitions.

Terms used in this part have the following meanings:

Act. The Communications Act of 1934, as amended.

Advanced intelligent network. Advanced Intelligent Network is a telecommunications network architecture in which call processing, call routing, and network management are provided by means of centralized databases located at points in an incumbent local exchange carrier's network.

Advanced services. The term “advanced services” is defined as high speed, switched, broadband, wireline telecommunications capability that enables users to originate and receive high-quality voice, data, graphics or video telecommunications using any technology.

Arbitration, final offer. Final offer arbitration is a procedure under which each party submits a final offer concerning the issues subject to arbitration, and the arbitrator selects, without modification, one of the final offers by the parties to the arbitration or portions of both such offers. “Entire package final offer arbitration,” is a procedure under which the arbitrator must select, without modification, the entire proposal submitted by one of the parties to the arbitration. “Issue-by-issue final offer arbitration,” is a procedure under which the arbitrator must select, without modification, on an issue-by-issue basis, one of the proposals submitted by the parties to the arbitration.

Billing. Billing involves the provision of appropriate usage data by one telecommunications carrier to another to facilitate customer billing with attendant acknowledgements and status reports. It also involves the exchange of information between telecommunications carriers to process claims and adjustments.

Binder or binder group. Copper pairs bundled together, generally in groups of 25, 50 or 100.

Business line. A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies:

(1) Shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services,

(2) Shall not include non-switched special access lines,

(3) Shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 “business lines.”

Commercial Mobile Radio Service (CMRS). CMRS has the same meaning as that term is defined in § 20.3 of this chapter.

Commingling. Commingling means the connecting, attaching, or otherwise linking of an unbundled network element, or a combination of unbundled network elements, to one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC, or the combining of an unbundled network element, or a combination of unbundled network elements, with one or more such facilities or services. Commingle means the act of commingling.

Commission. Commission refers to the Federal Communications Commission.

Day. Day means calendar day.

Dialing Parity. The term dialing parity means that a person that is not an affiliate of a local exchange carrier is able to provide telecommunications services in such a manner that customers have the ability to route automatically, without the use of any access code, their telecommunications to the telecommunications service provider of the customer's designation from among 2 or more telecommunications service providers (including such local exchange carrier).

Directory assistance service. Directory assistance service includes, but is not limited to, making available to customers, upon request, information contained in directory listings.

Directory listings. Directory listings are any information:

(1) Identifying the listed names of subscribers of a telecommunications carrier and such subscriber's telephone numbers, addresses, or primary advertising classifications (as such classifications are assigned at the time of the establishment of such service), or any combination of such listed names, numbers, addresses or classifications; and

(2) That the telecommunications carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format.

Downstream database. A downstream database is a database owned and operated by an individual carrier for the purpose of providing number portability in conjunction with other functions and services.

Enhanced extended link. An enhanced extended link or EEL consists of a combination of an unbundled loop and unbundled dedicated transport, together with any facilities, equipment, or functions necessary to combine those network elements.

Equipment necessary for interconnection or access to unbundled network elements. For purposes of section 251(c)(2) of the Act, the equipment used to interconnect with an incumbent local exchange carrier's network for the transmission and routing of telephone exchange service, exchange access service, or both. For the purposes of section 251(c)(3) of the Act, the equipment used to gain access to an incumbent local exchange carrier's unbundled network elements for the provision of a telecommunications service.

Fiber-based collocator. A fiber-based collocator is any carrier, unaffiliated with the incumbent LEC, that maintains a collocation arrangement in an incumbent LEC wire center, with active electrical power supply, and operates a fiber-optic cable or comparable transmission facility that

(1) Terminates at a collocation arrangement within the wire center;

(2) Leaves the incumbent LEC wire center premises; and

(3) Is owned by a party other than the incumbent LEC or any affiliate of the incumbent LEC, except as set forth in this paragraph. Dark fiber obtained from an incumbent LEC on an indefeasible right of use basis shall be treated as non-incumbent LEC fiber-optic cable. Two or more affiliated fiber-based collocators in a single wire center shall collectively be counted as a single fiber-based collocator. For purposes of this paragraph, the term affiliate is defined by 47 U.S.C. 153(1) and any relevant

interpretation in this Title.

Incumbent Local Exchange Carrier (Incumbent LEC). With respect to an area, the local exchange carrier that:

(1) On February 8, 1996, provided telephone exchange service in such area; and

(2)(i) On February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to § 69.601(b) of this chapter; or

(ii) Is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in paragraph (2)(i) of this section.

Information services. The term information services means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

Interconnection. Interconnection is the linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic.

Intermodal. The term intermodal refers to facilities or technologies other than those found in traditional telephone networks, but that are utilized to provide competing services. Intermodal facilities or technologies include, but are not limited to, traditional or new cable plant, wireless technologies, and power line technologies.

Known disturber. An advanced services technology that is prone to cause significant interference with other services deployed in the network.

Local Access and Transport Area (LATA). A Local Access and Transport Area is a contiguous geographic area--

(1) Established before February 8, 1996 by a Bell operating company such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or

(2) Established or modified by a Bell operating company after February 8, 1996 and approved by the Commission.

Local Exchange Carrier (LEC). A LEC is any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c) of the Act, except to the extent that the Commission finds that such service should be included in the definition of the such term.

Maintenance and repair. Maintenance and repair involves the exchange of information between telecommunications carriers where one initiates a request for maintenance or repair of existing products and services or unbundled network elements or combination thereof from the other with attendant acknowledgements and status reports.

Meet point. A meet point is a point of interconnection between two networks, designated by two telecommunications carriers, at which one carrier's responsibility for service begins and the other carrier's responsibility ends.

Meet point interconnection arrangement. A meet point interconnection arrangement is an arrangement by which each telecommunications carrier builds and maintains its network to a meet point.

Mobile wireless service. A mobile wireless service is any mobile wireless telecommunications service, including any commercial mobile radio service.

Multi-functional equipment. Multi-functional equipment is equipment that combines one or more functions that are necessary for interconnection or

access to unbundled network elements with one or more functions that would not meet that standard as stand-alone functions.

Network element. A network element is a facility or equipment used in the provision of a telecommunications service. Such term also includes, but is not limited to, features, functions, and capabilities that are provided by means of such facility or equipment, including but not limited to, subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

Operator services. Operator services are any automatic or live assistance to a consumer to arrange for billing or completion of a telephone call. Such services include, but are not limited to, busy line verification, emergency interrupt, and operator-assisted directory assistance services.

Physical collocation. Physical collocation is an offering by an incumbent LEC that enables a requesting telecommunications carrier to:

(1) Place its own equipment to be used for interconnection or access to unbundled network elements within or upon an incumbent LEC's premises;

(2) Use such equipment to interconnect with an incumbent LEC's network facilities for the transmission and routing of telephone exchange service, exchange access service, or both, or to gain access to an incumbent LEC's unbundled network elements for the provision of a telecommunications service;

(3) Enter those premises, subject to reasonable terms and conditions, to install, maintain, and repair equipment necessary for interconnection or access to unbundled elements; and

(4) Obtain reasonable amounts of space in an incumbent LEC's premises, as provided in this part, for the equipment necessary for interconnection or access to unbundled elements, allocated on a first-come, first-served basis.

Premises. Premises refers to an incumbent LEC's central offices and serving wire centers; all buildings or similar structures owned, leased, or otherwise controlled by an incumbent LEC that house its network facilities; all structures that house incumbent LEC facilities on public rights-of-way, including but not limited to vaults containing loop concentrators or similar structures; and all land owned, leased, or otherwise controlled by an incumbent LEC that is adjacent to these central offices, wire centers, buildings, and structures.

Pre-ordering and ordering. Pre-ordering and ordering includes the exchange of information between telecommunications carriers about: current or proposed customer products and services; or unbundled network elements, or some combination thereof. This information includes loop qualification information, such as the composition of the loop material, including but not limited to: fiber optics or copper; the existence, location and type of any electronic or other equipment on the loop, including but not limited to, digital loop carrier or other remote concentration devices, feeder/distribution interfaces, bridge taps, load coils, pair-gain devices, disturbers in the same or adjacent binder groups; the loop length, including the length and location of each type of transmission media; the wire gauge(s) of the loop; and the electrical parameters of the loop, which may determine the suitability of the loop for various technologies.

Provisioning. Provisioning involves the exchange of information between telecommunications carriers where one executes a request for a set of products and services or unbundled network elements or combination thereof from the other with attendant acknowledgements and status reports.

Rural telephone company. A rural telephone company is a LEC operating entity to the extent that such entity:

(1) Provides common carrier service to any local exchange carrier study area that does not include either:

(i) Any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or

(ii) Any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;

(2) Provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

(3) Provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or

(4) Has less than 15 percent of its access lines in communities of more than 50,000 on February 8, 1996.

Service control point. A service control point is a computer database in the public switched network which contains information and call processing instructions needed to process and complete a telephone call.

Service creation environment. A service creation environment is a computer containing generic call processing software that can be programmed to create new advanced intelligent network call processing services.

Service provider. A service provider is a provider of telecommunications services or a provider of information services.

Signal transfer point. A signal transfer point is a packet switch that acts as a routing hub for a signaling network and transfers messages between various points in and among signaling networks.

State. The term state includes the District of Columbia and the Territories and possessions.

State commission. A state commission means the commission, board, or official (by whatever name designated) which under the laws of any state has regulatory jurisdiction with respect to intrastate operations of carriers. As referenced in this part, this term may include the Commission if it assumes responsibility for a proceeding or matter, pursuant to section 252(e)(5) of the Act or § 51.320. This term shall also include any person or persons to whom the state commission has delegated its authority under sections 251 and 252 of the Act and this part.

State proceeding. A state proceeding is any administrative proceeding in which a state commission may approve or prescribe rates, terms, and conditions including, but not limited to, compulsory arbitration pursuant to section 252(b) of the Act, review of a Bell operating company statement of generally available terms pursuant to section 252(f) of the Act, and a proceeding to determine whether to approve or reject an agreement adopted by arbitration pursuant to section 252(e) of the Act.

Technically feasible. Interconnection, access to unbundled network elements, collocation, and other methods of achieving interconnection or access to unbundled network elements at a point in the network shall be deemed technically feasible absent technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier for such interconnection, access, or methods. A determination of technical feasibility does not include consideration of economic, accounting, billing, space, or site concerns, except that space and site concerns may be considered in circumstances where there is no possibility of expanding the space available. The fact that an incumbent LEC must modify its facilities or equipment to respond to such request does not determine whether satisfying such request is technically feasible. An incumbent LEC that claims that it cannot satisfy such request because of adverse network reliability impacts must prove to the state commission by clear and convincing evidence that such interconnection, access, or methods would result in specific and significant adverse network reliability impacts.

Telecommunications carrier. A telecommunications carrier is any provider of telecommunications ser-

vices, except that such term does not include aggregators of telecommunications services (as defined in section 226 of the Act). A telecommunications carrier shall be treated as a common carrier under the Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage. This definition includes CMRS providers, interexchange carriers (IXCs) and, to the extent they are acting as telecommunications carriers, companies that provide both telecommunications and information services. Private Mobile Radio Service providers are telecommunications carriers to the extent they provide domestic or international telecommunications for a fee directly to the public.

Telecommunications service. The term telecommunications service refers to the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

Telephone exchange service. A telephone exchange service is:

(1) A service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or

(2) A comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

Telephone toll service. The term telephone toll service refers to telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.

Triennial Review Order. The Triennial Review Order means the Commission's Report and Order and Order on Remand and Further Notice of Proposed Rulemaking in CC Docket Nos. 01-338, 96-98, and 98-147.

Triennial Review Remand Order. The Triennial Review Remand Order is the Commission's Order on Remand in CC Docket Nos. 01-338 and 04-313 (released February 4, 2005).

Unreasonable dialing delay. For the same type of calls, dialing delay is “unreasonable” when the dialing delay experienced by the customer of a competing provider is greater than that experienced by a customer of the LEC providing dialing parity, or nondiscriminatory access to operator services or directory assistance.

Virtual collocation. Virtual collocation is an offering by an incumbent LEC that enables a requesting telecommunications carrier to:

(1) Designate or specify equipment to be used for interconnection or access to unbundled network elements to be located within or upon an incumbent LEC's premises, and dedicated to such telecommunications carrier's use;

(2) Use such equipment to interconnect with an incumbent LEC's network facilities for the transmission and routing of telephone exchange service, exchange access service, or both, or for access to an incumbent LEC's unbundled network elements for the provision of a telecommunications service; and

(3) Electronically monitor and control its communications channels terminating in such equipment.

Wire center. A wire center is the location of an incumbent LEC local switching facility containing one or more central offices, as defined in the Appendix to part 36 of this chapter. The wire center boundaries define the area in which all customers served by a given wire center are located.

[61 FR 47348, Sept. 6, 1996; 64 FR 23241, April 30, 1999; 65 FR 1344, Jan. 10, 2000; 65 FR 2550, Jan. 18, 2000; 65 FR 8280, Feb. 18, 2000; 65 FR 54438, Sept. 8, 2000; 66 FR 43521, Aug. 20, 2001; 68 FR 52293, Sept. 2, 2003; 70 FR 8952, Feb. 24, 2005]

SOURCE: 61 FR 45619, Aug. 29, 1996; 61 FR 47348, Sept. 6, 1996; 68 FR 52293, Sept. 2, 2003; 68 FR 64000, Nov. 12, 2003, unless otherwise noted.

AUTHORITY: Sections 1-5, 7, 201-05, 207-09, 218, 225-27, 251-54, 256, 271, 303(r), 332, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 151-55, 157, 201-05, 207-09, 218, 225-27, 251-54, 256, 271, 303(r), 332, 47 U.S.C. 157 note, unless otherwise noted.

47 C. F. R. § 51.5, 47 CFR § 51.5

Current through September 8, 2011; 76 FR 55777.

END OF DOCUMENT

Connecticut General Statutes Annotated Currentness
Title 4. Management of State Agencies
Chapter 54. Uniform Administrative Procedure Act (Refs & Annos)

§ 4-176. Declaratory rulings. Petitions. Regulations

(a) Any person may petition an agency, or an agency may on its own motion initiate a proceeding, for a declaratory ruling as to the validity of any regulation, or the applicability to specified circumstances of a provision of the general statutes, a regulation, or a final decision on a matter within the jurisdiction of the agency.

(b) Each agency shall adopt regulations, in accordance with the provisions of this chapter, that provide for (1) the form and content of petitions for declaratory rulings, (2) the filing procedure for such petitions and (3) the procedural rights of persons with respect to the petitions.

(c) Within thirty days after receipt of a petition for a declaratory ruling, an agency shall give notice of the petition to all persons to whom notice is required by any provision of law and to all persons who have requested notice of declaratory ruling petitions on the subject matter of the petition.

(d) If the agency finds that a timely petition to become a party or to intervene has been filed according to the regulations adopted under subsection (b) of this section, the agency: (1) May grant a person status as a party if the agency finds that the petition states facts demonstrating that the petitioner's legal rights, duties or privileges shall be specifically affected by the agency proceeding; and (2) may grant a person status as an intervenor if the agency finds that the petition states facts demonstrating that the petitioner's participation is in the interests of justice and will not impair the orderly conduct of the proceedings. The agency may define an intervenor's participation in the manner set forth in subsection (d) of section 4-177a.

(e) Within sixty days after receipt of a petition for a declaratory ruling, an agency in writing shall: (1) Issue a ruling declaring the validity of a regulation or the applicability of the provision of the general statutes, the regulation, or the final decision in question to the specified circumstances, (2) order the matter set for specified proceedings, (3) agree to issue a declaratory ruling by a specified date, (4) decide not to issue a declaratory ruling and initiate regulation-making proceedings, under section 4-168, on the subject, or (5) decide not to issue a declaratory ruling, stating the reasons for its action.

(f) A copy of all rulings issued and any actions taken under subsection (e) of this section shall be promptly delivered to the petitioner and other parties personally or by United States mail, certified or registered, postage prepaid, return receipt requested.

(g) If the agency conducts a hearing in a proceeding for a declaratory ruling, the provisions of subsection (b) of section 4-177c, section 4-178 and section 4-179 shall apply to the hearing.

(h) A declaratory ruling shall be effective when personally delivered or mailed or on such later date specified by the agency in the ruling, shall have the same status and binding effect as an order issued in a contested case and shall be a final decision for purposes of appeal in accordance with the provisions of section 4-183. A declaratory ruling shall contain the names of all parties to the proceeding, the particular facts on which it is based and the reasons for its conclusion.

(i) If an agency does not issue a declaratory ruling within one hundred eighty days after the filing of a petition therefor, or within such longer period as may be agreed by the parties, the agency shall be deemed to have decided not to issue such ruling.

(j) The agency shall keep a record of the proceeding as provided in section 4-177.

CREDIT(S)

(1971, P.A. 854, § 11, eff. Jan. 1, 1972; 1973, P.A. 73-620, § 8, eff. June 11, 1973; 1982, P.A. 82-349, § 3, eff. July 1, 1982; 1982, P.A. 82-472, § 178, eff. July 1, 1982; 1988, P.A. 88-317, § 10, eff. July 1, 1989.)

Current through the Gen.St., Rev. to 1-1-2011

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Conn. Agencies Regs. § 16-1-114

Regulations of Connecticut State Agencies Currentness
Title 16. Public Service Companies
Department of Public Utility Control (1)
Rules of Practice
Article 4. Miscellaneous Proceedings
Part 4. Requests for Advisory Rulings
Sec. 16-1-114. Form of petition for advisory ruling

Any interested person may at any time request an advisory ruling of the commissioners with respect to the applicability to such person of any statute, regulation or order enforced, administered, or promulgated by the commissioners. Such request shall be addressed to the commission and sent to the executive secretary by mail or delivered in person during normal business hours. The request shall be signed by the person in whose behalf the inquiry is made. It shall give the address of the person inquiring and the name and address of such person's attorney, if applicable. The request shall state clearly and concisely the substance and nature of the request; it shall identify the statute, regulation or order concerning which the inquiry is made and shall identify the particular aspect thereof to which the inquiry is directed. The request for an advisory ruling shall be accompanied by a statement of any supporting data, facts and arguments that support the position of the person making the inquiry. Where applicable part 1 of article 3 governs the form and contents of the petition for advisory ruling.

(Effective December 21, 1971.)

§ 16-1-114, CT ADC § 16-1-114

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END OF DOCUMENT

Conn. Agencies Regs. § 16-1-115

Regulations of Connecticut State Agencies Currentness
Title 16. Public Service Companies
Department of Public Utility Control (1)
Rules of Practice
Article 4. Miscellaneous Proceedings
Part 4. Requests for Advisory Rulings
Sec. 16-1-115. Procedure after petition filed

(a) Notice to other persons. The commission may give notice to any person that such an advisory ruling has been requested and may receive and consider data, facts, arguments and opinions from persons other than the person requesting the ruling.

(b) Provision for hearing. If the commissioners deem a hearing necessary or helpful in determining any issue concerning the request for advisory ruling, the commission shall schedule such hearing and give such notice thereof as shall be appropriate. The provisions of article 2 govern the practice and procedure of the commission in any hearing concerning an advisory ruling.

(c) Decision on petition, ruling denied. If the commissioners determine that an advisory ruling will not be rendered, the commission shall within ten (10) days thereafter notify the person so inquiring that the request has been denied and furnish a statement of the reasons on which the commissioners relied in so deciding.

(d) Decision on petition, ruling granted. If the commissioners render an advisory ruling, a copy of the ruling shall be sent to the person requesting it and to that person's attorney, if applicable, and to any other person who has filed a written request for a copy with the executive secretary.

(Effective December 21, 1971.)

§ 16-1-115, CT ADC § 16-1-115

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